DIVISION II

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SAM BIRD, Judge

CA05-1391

JUNE 14, 2006

APPEAL FROM THE BENTON COUNTY CIRCUIT COURT
[NO. J2004-287-D/N]

BOBBIE GOUGH-JONES
APPELLANT

HON. JAY T. FINCH, JUDGE

V.

AFFIRMED; MOTION GRANTED

ARKANSAS DEPARTMENT OF HUMAN SERVICES
APPELLEE

This appeal arises from an order of the Benton County Circuit Court terminating the parental rights of appellant, Bobbie Gough-Jones, to her minor child A.G., who was born on March 27, 1997.[1] Appellant's attorney has filed a motion to withdraw as counsel and a no-merit brief pursuant to *Linker-Flores v. Arkansas Department of Human Services*, ___ Ark. ___, ___S.W.3d ___ (Oct. 7, 2004) (*Linker-Flores I*), and Ark. Sup. Ct. R. 4-3(j)(1). Appellant filed no pro se points for reversal. We affirm and grant counsel's motion to withdraw.

[1] Appellant has another child, H.C., born on March 24, 2001, who was removed from her custody at the same time as A.G. The order from which this appeal arises only terminated appellant's parental rights with respect to A.G.

The Arkansas Department of Human Services (DHS) removed A.G. from appellant's custody on April 7, 2004, after A.G.'s school reported to Bentonville police that A.G. was repeatedly late for school and was "rarely" picked up on time. During a follow-up visit to appellant's home, investigators found drug paraphernalia and drugs inside the residence. At a probable cause hearing on April 13, 2004, appellant testified that A.G. was "held out" of school for almost three weeks because appellant's mother was "really bad sick" and was "gonna die." Appellant said that she notified the school and "had no idea that was a form of neglect" until investigators came to her residence. She explained that A.G. was late to school because she had a "very hard problem" with "pulling [herself] up out of bed every day to face the day without [her] mother." She said that A.G. was left at the school after hours "probably three" times because she was at work, and her fiancé was supposed to have taken care of A.G. She also testified that her fiancé failed to pick up A.G. from school because he (her fiancé) was at home asleep with her daughter.

Appellant stated that she had a friend, Casey, who was staying with her at the time A.G. was removed. She said that she did not know Casey's last name, despite knowing her for three years. She admitted that, when A.G was removed from her home, there was marijuana in the residence, but she denied knowing that it was there. She said that she had used marijuana before, but that she had not used it for "probably a couple of months." She also denied using marijuana with her friend Casey.

Appellant said that she "couldn't hold down a job" because of having to pick A.G. up from school. Specifically, she explained that she was being called from her job to pick him up because her fiancé would not do it. She said that she had not had a full-time job for a year and that she did not have a job at the time of the probable cause hearing. She testified that she had some "alternatives" for a job and places to live, and that she had not been to counseling since her mother's death. She stated that she was supposed to begin a job at Embassy Suites, depending upon how things worked out. She also said that she planned to move to Seligman, Missouri, to stay with her sister.

DHS investigator Jason Smith testified that he was called to appellant's home after A.G. was left at school. He said that police had found several drug-related items in the home. He also said that, when he entered the home, he found it to be "clean" and "tidy." He stated that, when he viewed the children, they appeared to be "healthy." He did not observe any "issue of malnourishment or emotional trauma." He said that A.G. had been left at school, but there was no indication that appellant was going to abandon him. He explained that DHS was concerned about appellant being evicted from her home, about "people in and out of the home" who were using drugs, about the possibility that appellant was leaving her children with these people, and about the fact that appellant could not "wake up in the morning and get [her] kids to school" or pick them up. Following the hearing, the court found probable cause for the children to remain in DHS care.

On June 8, 2004, appellant tested positive for methamphetamines and marijuana, and Steven Jones, whom she married on May 19, 2004, refused to complete a court-ordered drug test. At an adjudication hearing on June 8, it was stipulated that A.G. was dependent-neglected on the grounds of educational neglect and inadequate supervision. In an order entered on July 22, 2004, the trial court adjudicated A.G. as dependent-neglected and ordered that he remain in DHS custody.

At a review and contempt hearing[2] held on September 7, 2004, appellant's husband Steven Jones said that he had been in jail for "a little over a month" based on a "failure to appear." He said that he had one prior drug-related charge for possession of marijuana, but it had been "months" since he had used any type of illegal drug. He stated that he had taken two drug tests: one at the hospital on June 8, 2004, and a second "on or about" July 15, 2004, at DHS. He explained that he refused to take any further tests at DHS, but he did not have a problem with taking a test at the hospital.

Appellant also testified at the review hearing. She said that she completed a drug test and was told that she was positive for amphetamines and marijuana. She admitted that she failed to complete other tests, although she was asked to do so.

Other testimony at the hearing revealed that appellant refused to comply with random drug testing on the following dates: July 15, 2004; July 29, 2004; and August 5, 2004. On

[2] As explained herein, appellant and Steven Jones refused to submit to certain mandatory drug tests during the course of the proceedings. Thus, the State filed petitions for contempt against them.

July 15, 2004, Jones tested positive for methamphetamines and amphetamines. On September 16, 2004, both appellant and Jones tested positive for cocaine, marijuana, amphetamines, and methamphetamines. Pursuant to an order dated November 5, 2004, appellant and Jones were found to be in willful contempt of court and were placed in jail. They were also ordered to cooperate with future drug testing at the direction of DHS.

Appellant tested positive for marijuana and methamphetamines on December 2, 2004, and Jones refused testing on December 16, 2004. Appellant tested negative on January 13, 2005, while Jones tested positive for amphetamines on that date. On March 28, 2005, the State filed a petition to terminate appellant's parental rights with respect to A.G. and H.C.,[3] alleging that the children had been out of the home since April 7, 2004, and that appellant had made little progress toward completion of the case plan goals and court orders. On March 31, 2005, appellant tested positive for marijuana and amphetamines.

In a permanency planning order dated April 5, 2005, the trial court ordered appellant to, among other things, obtain and complete a drug and alcohol assessment and actively seek inpatient drug treatments; to refrain from the use and/or possession of any and all illegal substances and/or drug paraphernalia; and to cooperate with random drug testing at the direction of DHS. The trial court also ordered appellant to maintain safe, stable, and appropriate housing; to notify DHS at least twenty-four hours in advance if transportation assistance was needed; and to cooperate with DHS regarding all case plan goals, referrals,

[3] See footnote 1, *supra*.

and/or services.

On August 25, 2005, the court held a hearing on the termination of appellant's parental rights. Appellant's counsel, explaining that appellant had called to say that she might not have transportation to the hearing, requested a continuance until appellant was "able to arrive." Counsel for DHS responded that appellant had not contacted DHS to arrange for transportation to the hearing. The court denied counsel's request for a continuance when appellant did not appear. The trial court subsequently terminated appellant's parental rights with respect to A.G.

In *Linker-Flores I*, ___ Ark. at ___, ___ S.W.3d at ___, our supreme court stated as follows:

> [A]ppointed counsel for an indigent parent on a first appeal from an order terminating parental rights may petition this court to withdraw as counsel if, after a conscientious review of the record, counsel can find no issue of arguable merit for appeal. Counsel's petition must be accompanied by a brief discussing any arguably meritorious issue for appeal. The indigent parent must be provided with a copy of the brief and notified of her right to file points for reversal within thirty days. If this court determines, after a full examination of the record, that the appeal is frivolous, the court may grant counsel's motion and dismiss the appeal.[4]

The supreme court has since explained that our review of adverse rulings in no-merit termination-of-parental-rights cases is limited to the termination hearing. *See Lewis v. Ark. Dep't of Human Servs.*, ___ Ark. ___, ___ S.W.3d ___ (Nov. 17, 2005). However, when the

[4] The proper procedure is to grant counsel's motion to withdraw and to affirm the trial court's decision, not to dismiss the appeal. *See Smith v. Ark. Dep't of Human Servs.*, ___ Ark. ___, ___S.W.3d ___ (Dec. 7, 2005).

trial court has taken the prior record into consideration in its decision, a "conscientious review of the record" requires the appellate court to review all pleadings and testimony in the case on the question of the sufficiency of the evidence supporting the decision to terminate. *See id*. In this case, there were two adverse rulings: the trial court's decision to terminate appellant's parental rights and its decision to deny appellant's request for a continuance.

Sufficiency of the Evidence to Support Termination of Parental Rights

When the issue is one involving the termination of parental rights, there is a heavy burden placed upon the party to terminate the relationship. *Kight v. Arkansas Dep't of Human Servs*., ___ Ark. App. ___, ___ S.W.3d ___ (Mar. 8, 2006). Termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents. *Id*. Parental rights, however, will not be enforced to the detriment or destruction of the health and well-being of the child. *Id*.

In *Lewis, supra*, our supreme court reiterated the standard of review in parental-rights termination cases:

> Our standard of review in cases involving the termination of parental rights is well established. Arkansas Code Annotated section 9-27-341(b)(3) (Repl. 2002) requires an order terminating parental rights to be based upon clear and convincing evidence. Clear and convincing evidence is that degree of proof that will produce in the fact finder a firm conviction as to the allegation sought to be established. When the burden of proving a disputed fact is by clear and convincing evidence, the question that must be answered on appeal is whether the trial court's finding that the disputed fact was proven by clear and convincing evidence was clearly erroneous. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. Such cases are reviewed *de novo* on appeal. However, we do give a high degree of deference to the trial court, as it is in a far superior position to observe the parties before it and judge the credibility of the witnesses.

___ Ark. at ___, ___ S.W.3d at ___ (citations omitted).

Before a trial court may terminate parental rights, it must find by clear and convincing evidence that such termination is in the best interest of the child. Ark. Code Ann. § 9-27-341(b)(3)(A) (Supp. 2003). It must also find by clear and convincing evidence that at least one of the enumerated statutory grounds for termination exists. One such ground is "[t]hat a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the custody of the parent for twelve (12) months and, despite a meaningful effort by the department to rehabilitate the parent and correct the conditions that caused removal, those conditions have not been remedied by the parent." Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(*a*) (Supp. 2003). In this case, the trial court found that terminating appellant's parental rights

was in A.G.'s best interest and also found that multiple statutory grounds for termination existed, including those listed in Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(*a*).

Here, A.G. had clearly been out of the home for over a year. In addition, there was evidence that, despite DHS's attempt to assist appellant, she repeatedly refused to comply with mandatory drug testing procedures, and she tested positive for drugs on more than one occasion. Notably, she tested positive three days after the termination petition was filed. There was also evidence that appellant failed to ensure that her home was free from others who were using drugs (*i.e*., her husband tested positive for drugs on numerous occasions). Moreover, she failed to notify DHS that she needed transportation to the termination hearing, and she did not attend the hearing. Based on our review of the evidence in this case, we cannot say that the trial judge's decision to terminate appellant's parental rights was clearly erroneous. This is not a meritorious ground for appeal.

Motion for Continuance

In *Smith v. Arkansas Department of Human Services*, ___ Ark. App. ___, ___, ___ S.W.3d ___, ___ (Dec. 7, 2005), this court stated as follows:

> The law is well established that the granting or denial of a motion for continuance is within the sound discretion of the trial court, and that court's decision will not be reversed absent an abuse of discretion amounting to a denial of justice. When deciding whether a continuance should be granted, the trial court should consider the following factors[:] (1) the diligence of the movant; (2) the probable effect of the testimony at trial; (3) the likelihood of procuring the witness's attendance in the event of postponement; (4) the filing of an affidavit, stating not only what facts the witness would prove, but also that the appellant believes them to be true. Additionally, the appellant must show prejudice from the denial of a motion for continuance.

(Citations omitted.) The trial court did not abuse its discretion by denying appellant's motion for a continuance in this case. Clearly, appellant could have contacted DHS for transportation to the termination hearing, but she failed to do so. In light of this failure to arrange for transportation, we cannot see how the trial court's denial of appellant's request for a continuance constitutes an abuse of discretion amounting to a denial of justice. This is not a meritorious ground for appeal.

Affirmed; motion granted.

GLADWIN and ROBBINS, JJ., agree.